IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 16, 2008 Session

STATE OF TENNESSEE v. JOHN ALLEN MURPHY, JR.

Direct Appeal from the Criminal Court for Davidson County
No. 2004-C-2280 Seth Norman, Judge

No. M2007-02416-CCA-R3-CD - Filed June 12, 2009

The defendant, John Allen Murphy, Jr., was convicted by a Davidson County jury of assault, a Class A misdemeanor, and resisting arrest, a Class B misdemeanor. At the conclusion of the sentencing hearing, the trial court sentenced him as a Range I, standard offender to consecutive terms of eleven months, twenty-nine days for the assault conviction and six months for the resisting arrest conviction, with the sentences suspended and the defendant placed on probation and ordered to attend a fifty-two-week dual substance abuse/anger management course. On appeal, the defendant challenges the sufficiency of the evidence for both convictions and argues that the trial court erred by denying his motion to sever the offenses, not instructing the jury on self-defense, and ordering consecutive sentencing. Following our review, we conclude that the evidence was sufficient to sustain the convictions but that the trial court erred by not instructing the jury on self-defense, by imposing consecutive sentencing, and by denying the defendant's motion to sever the offenses. We further conclude that the failure to sever the offenses constituted reversible error. Accordingly, we reverse the defendant's convictions and remand for separate trials for each offense.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed and Remanded for New Trials

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Michael J. Flanagan (on appeal) and Daniel D. Warlick (at trial), Nashville, Tennessee, for the appellant, John Allen Murphy, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Sharon Reddick, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case stems from a September 26, 2003, altercation between the defendant and his then-girlfriend, Olivia Nash, which led to the defendant's October 2, 2003, arrest on a warrant for domestic assault.[1] The victim testified at trial that she and the defendant, who lived in the same apartment building at the time, were in an exclusive dating relationship in September 2003. Each had keys to the other's apartment, and the defendant frequently spent the night at her apartment. On the afternoon of September 26, 2003, the defendant and his sister joined her at a keg party at Vanderbilt University's business school, where the victim was an M.B.A. student. From that event, the three went to dinner and then to "Buffalo Billiards" to shoot pool. At approximately 11:00 p.m. or 12:00 a.m., they went home, stopping en route to drop the defendant's sister at her apartment. The victim estimated that she drank four to six beers during the course of the afternoon and evening. She said that the defendant also consumed alcohol during the evening, but that she did not know exactly how many drinks he had.

The victim testified that she told the defendant when they reached her apartment that she preferred to sleep alone, reminding him that she had to get up early for work the next day. The defendant, however, pushed his way in, saying that he wanted to sleep at her apartment. She repeated her request, but he ignored her and she decided to let it go. After they got into bed together, however, the defendant "aggressively tried to initiate sexual contact." She told him she was tired and that he needed to go home, but he "kept trying to push himself" on her.

The victim said that she repeatedly asked the defendant to leave, but he refused. Things became "rather heated," and she began to feel "very nervous and anxious." Finally, she pulled the comforter off her bed and went to sleep on the couch. The defendant then "came storming out of the bedroom and yanked the covers" off, causing her to fall off the couch onto her hands and knees. She followed him into the bedroom, turned on the light, spanked him once on the buttocks, and told him to get up and leave her apartment. He refused and she splashed him with a glass of water and demanded several more times that he leave. In response, he told her that she needed to calm down and should "just shut up and go to bed[.]" She picked up the telephone, and the defendant asked her if she was going to call the police. She replied yes and dialed 9-1-1, but hung up when the operator answered.

The victim testified that the defendant reacted with violence, jumping out of bed, grabbing her by the hair, and slinging her into the doorjamb. She said that she fell to the floor and described what next ensued:

> I don't know if he was screaming or I was screaming or what was happening, but when I was on the ground he kicked me and was stepping on my arm. He was

[1] The domestic assault charge was later changed to simple assault.

kicking me in the side, and I was trying to get up and he would grab my hair and push me back down on the ground. At some point 9-1-1 called back, and . . . I don't remember exactly the order of things.

The victim testified that she answered the phone and the defendant began getting dressed, at the same time telling her that she was "a crazy fucking bitch." She said she told the 9-1-1 operator that she no longer needed help and hung up the phone again. The 9-1-1 operator immediately called back, and she again told her that she did not need any help. The defendant left her apartment while she was still on the telephone with the 9-1-1 operator. A police officer responded to the scene, and she went down to meet him at the gates of the apartment complex. The victim said she told the officer that she was fine and did not want to press charges because she knew that the defendant could have been "anywhere listening" and that he had a key to her apartment. She also explained that the defendant's presence and possession of the key to her apartment were why she told the 9-1-1 operator that she did not need any help.

The victim testified that she made no attempts to contact the defendant that night. She did, however, call him to ask for her key the next day. She also sent him a letter.[2] She said she left immediately after work on Friday to spend the weekend with a friend in Cincinnati because she was afraid to return to her apartment. Bruises from the incident appeared on her body that weekend, and a friend took photographs of the injuries when she returned to Nashville on Monday. The victim identified the photographs, which were admitted into evidence, and explained that they showed a bruise on her right hip from where she struck the doorjamb and a bruise on her left thigh where the defendant kicked her. She said she also had light marks on her forearm, but they had faded by the time the photographs were taken.

The victim testified that she knew that the defendant was scheduled to be in Chattanooga for work on Monday and that it would, consequently, be safe for her to spend Monday night in her apartment. On Tuesday, she had the locks changed, saw a doctor at the Vanderbilt Student Health Center, and sought counseling from the school's domestic violence center. After talking with the school counselor and her friend, she went to the police late that night, and a warrant for the defendant's arrest was issued the next day, Wednesday, October 1, 2003.

On cross-examination, the victim testified that the defendant's attack occurred in the time between her call to 9-1-1 and the 9-1-1 operator's first return call to her. However, when informed by defense counsel that the 9-1-1 operator called back only eight seconds after her hang-up call, the victim said that she was not sure exactly when the attack occurred. She testified: "Again, I don't recall the exact order of events. He moved with a swiftness and a velocity that I have never seen in a human being before so it could have been at any time in there, I do not recall." Defense counsel reviewed with the victim the three-page letter or email she had sent the defendant on the Monday following the incident. The victim acknowledged that she apologized in the letter for having lost

[2] Defense counsel and the defendant referred to this communication as an email rather than a letter.

her temper the night of the incident. She stated that she had at first blamed herself for the incident but developed a different viewpoint after talking with other victims of domestic violence.

Detective Brian Harbaugh of the Wilson County Sheriff's Department, who was employed as a detective with the Metro Nashville Police Department Domestic Violence Unit in 2003, testified that he interviewed the victim on October 1, 2003. The victim showed him her injuries, which were consistent with her account of the defendant's assault, and he assisted her in obtaining a warrant for the defendant's arrest on a charge of domestic assault. The next day, he went with an intern from Vanderbilt University to serve the warrant on the defendant at his law office. As he and the intern were waiting in his unmarked patrol car for a second detective to arrive, he saw the defendant walking toward the defendant's vehicle. Harbaugh approached the defendant, showed him his badge, and explained that he was a detective with the Metro Police Department and had a warrant for his arrest. He said that the defendant indicated he knew why he was there, telling him that if it was about the victim, "that happened a week ago."

Detective Harbaugh testified that the defendant got out of his vehicle and walked with him to his car, where he called for a marked patrol car to transport the defendant to jail and read and explained the warrant and booking process to him. The defendant then expressed a desire to return to his office to call his attorney. The defendant was wearing a cell phone on his belt, and Harbaugh told him that he could not allow him to leave but that he was free to use his cell phone to call anyone he wished. The defendant next indicated that he needed to go to his office to talk to his secretary, and Harbaugh once again told him he could not allow him to leave but that he could call her on his cell phone.

Detective Harbaugh testified that after about ten minutes the defendant stated that he was not under arrest and started to walk away. He said he told the defendant, "No, you are under arrest, stop, turn around," but the defendant continued to walk away. He said he walked after the defendant and grabbed his wrist, at the same time repeating that the defendant was under arrest, ordering him to stop and turn around, and telling him that he was going to handcuff him. The defendant reacted by trying to push him off with his body, and they ended up shoving against each other as he struggled to bring the defendant under control. Finally, he pushed the defendant into a nearby parked car, thereby gaining enough leverage to bring the defendant's hand behind his back. The defendant, however, continued to resist:

> I pushed him up against the car and then got one hand behind his back. Then, at that point, I just continued to apply pressure to his wrist and was telling him to stop resisting and to put his other hand behind the back. We started from about the back of the car and he continued to try to . . . push me off and push me back. We worked our way down the car and finally when we got to the hood, I was able to push him over further, which takes away their strength and basically their position to push me off.

On cross-examination, Detective Harbaugh acknowledged that the defendant's resistance consisted of his shoving against him with his body and that the defendant did not try to hit him or kick him.

Amy Bauernfeind, the Vanderbilt student intern who witnessed the arrest, testified that she heard Detective Harbaugh tell the defendant that he was there to serve an arrest warrant on him, that they were waiting for another vehicle to arrive, and that the defendant needed to remain where he was and be cooperative in the meantime. She said that the defendant offered several reasons for needing to return to his law office and that Detective Harbaugh repeatedly explained that he could not go. The defendant then took several strides toward the law office door. Detective Harbaugh told him to stop, but the defendant continued toward the office building. Detective Harbaugh grabbed the defendant's wrist, and a struggle between the men ensued. Bauernfeind described the defendant's attempts to get away from the detective:

> He -- there was definitely a struggle. He was doing everything he could, squirming and -- I mean, there was a bit of -- there was a brawl between the two men. I mean, there weren't punches but they were shoving one another and trying to squirm away from one another, [the defendant] was.

The defendant, a lawyer, testified that there was a point in his relationship with the victim when he considered marriage, but by August 2003, the relationship "was cooling way down." The victim had told him that she was going to spend her last semester in Paris, and he "figured [the relationship] was going to end." Nonetheless, things were fine between them during the course of their September 26, 2003, evening out together. During the drive home, however, the victim asked him if he thought she should stay in Nashville, and he told her that he thought she should go to Paris and that she should not stay because of him. The conversation appeared to him to be casual, and the victim did not seem to be upset by his answer.

The defendant testified that when he and the victim arrived home, he first escorted two female residents to their respective apartments before returning to the victim's apartment and letting himself in with his key. He said that the victim knew that he would be returning, never told him to leave, and got into bed with him. The defendant denied that he attempted to initiate sexual contact with the victim "in any aggressive way." He then clarified that he might have hugged and kissed the victim when she came to bed but that he did not try to have sex because he knew she had to get up early the next morning.

The defendant testified that he was aware of the victim's getting out of bed sometime during the night. He fell back asleep and was awakened by the victim's throwing water on him and hysterically yelling that she was calling the police. The defendant said his initial thought was that someone was breaking into the apartment. He stated that the victim then jumped on top of him and began hitting him. In response, he grabbed her hands and pushed her off him, causing her to fall backwards and hit her buttocks against the door. He described the episode as follows:

> It is like 1:00 o'clock in the morning and she throws -- I mean, I'm laying in bed and I feel this drink in a glass and she is yelling at me and then she comes -- I mean, all of this is within seconds. She throws this drink on me and I feel, you know, water and then I feel her kind of come up on me and she is just hitting me. I just didn't know -- I did not know what was going on.
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> So I try to roll over and I grab her hands and I am like, what is going on. She is -- you know, so I do, I push her back like this and she falls. (Demonstrating). I mean, I did -- I wasn't being delicate, you know, I was just pushing this screaming, irate, woman like off of me.

The defendant denied that he pulled a comforter off the victim, grabbed her by the hair, slung her onto the floor, or kicked, stomped, or struck her. He said he got dressed, went upstairs to his apartment, and double-bolted his door. He stated that the victim called his apartment thirty times that night and, when he did not answer, came upstairs and pounded on his door. The victim called him again the next day to apologize for her behavior, explaining that she had had too much to drink and was under a lot of stress. He said he told her in that conversation that he did not want to see her again. She then sent him the three-page email, to which he responded, followed by a second email in which she responded to his response.[3] The defendant testified that the statements he made in his email to the victim, in which he denied he had attacked her and stated that he had been awakened from sleep by her unprovoked attack, were true. He repeated that all he had done was to push the victim off him and said that he had felt threatened by her actions.

With respect to his October 2, 2003, arrest, the defendant testified that Detective Harbaugh told him he had a warrant for his arrest. He did not, however, remember his ever telling him that he was under arrest. The defendant stated that he did not believe that he could be arrested for a misdemeanor offense and thought that the encounter was an investigative Terry stop.[4] Therefore, after being "more than cooperative," he started toward his law office because he "needed to let somebody know that [he] was being arrested." The defendant denied that he used any physical force against the officer and said that he was just trying to get to the front of the building so that someone would know he was being arrested. He said he did not have his cell phone on him and would have used it if he had.

At the sentencing hearing, the State introduced the defendant's presentence report into evidence, which reflected that the thirty-seven-year-old defendant was sentenced to twenty-four hours in jail for contempt of court in 2000, had a 1991 conviction for driving while impaired, and was charged with DUI on April 6, 2007, with the case still pending. The State's sole witness was

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[3] The email exchanges between the victim and the defendant were admitted into evidence during the victim's testimony.

[4] See Terry v. Ohio, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1880 (1968).

a Metropolitan Nashville police officer who described his April 6, 2007, arrest of the defendant for DUI. The defendant, who was the sole witness in his own behalf, expressed his humiliation and remorse over the assault and described the treatment he had been seeking for his alcohol and depression issues.

At the conclusion of the hearing, the trial court sentenced the defendant to consecutive terms of eleven months, twenty-nine days for the assault conviction and six months for the resisting arrest conviction and ordered that the defendant complete a fifty-two-week dual anger management/substance abuse program, with the "[j]udgment reserved as to length of incarceration if defendant violates."

ANALYSIS

I. Motion for Severance

The defendant contends that the trial court abused its discretion by denying his motion for severance based on a finding that the offenses were part of a common scheme or plan. The State responds by arguing that the defendant has waived consideration of the issue by his failure to include an adequate record for review, namely, the transcript of the hearing at which the trial court considered the motion. The State contends that, without such, this court must presume that the record would have supported the trial court's ruling.

The record reveals that the defendant filed a pretrial motion to sever pursuant to Rule 14 of the Rules of Criminal Procedure, arguing that the offenses were not part of a common plan or scheme and that evidence of one would not be admissible at the trial of the other. In its written response, the State argued, *inter alia*, that evidence of the assault would be admissible at the defendant's trial for resisting arrest because the State had to prove that "an arrest was attempting to be made." The State further argued that the fact that the defendant made statements about the assault during his arrest "would be highly relevant" in his trial for assault, as would his "attempts to avoid prosecution after being charged with a criminal offense."

The court's minutes from March 11, 2005, state that the "cause came on to be heard by the Court upon a Motion to Sever which is taken under advisement." On April 7, 2005, the trial court entered a written order denying the motion on the basis that the incidents were part of a common plan or scheme. After a brief paragraph setting out the charges against the defendant, the court made the following findings in support of its ruling:

> Detective Harbaugh was attempting to arrest the defendant based on the warrant issued as a result of the assault charges when the defendant refused to be apprehended. The resisting arrest charge would not have arisen had the arrest warrant never been issued and executed. Since the resisting arrest charge was the result of the initial charge of assault, it cannot be maintained that the two charges are

independent of one another. Therefore, severance of the offenses would be inappropriate in this matter.

It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). While it is true that the transcript of the hearing on the motion to sever is not included in the record, it is not clear that any evidence was actually presented at the hearing. Furthermore, the arguments of the prosecutor and defense counsel, presumably made at the hearing on the motion, are included in the record in their respective written motions. We, therefore, elect to consider the issue on the merits.

Rule 14(b)(1) of the Rules of Criminal Procedure provides that if offenses have been consolidated pursuant to Rule 8(b), which allows for the permissive joinder of offenses deemed part of a common scheme or plan or of the same or similar character, "the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others." Tenn. R. Crim. P. 14(b)(1). If the defendant moves for severance, the burden is on the State to show that the offenses are part of a common scheme or plan and the evidence of each offense would be admissible in the trial of the other. State v. Denton, 149 S.W.3d 1, 13 (Tenn. 2004). A trial court's "decisions to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999); see also Denton, 149 S.W.3d at 12 ("Decisions concerning consolidation and severance of offenses pursuant to [Tennessee] Rules of Criminal Procedure 8(b), 13 and 14(b)(1) will be reviewed for an abuse of discretion."). "[A] trial court's refusal to sever offenses will be reversed only when the 'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" Shirley, 6 S.W.3d at 247 (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

Before denying a motion to sever offenses, the trial court should conclude that: (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of one offense is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect caused by the admission of the evidence. Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000) (citing State v. Burchfield, 664 S.W.2d 284, 286 (Tenn. 1984)).

There are three categories of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to be considered "signature crimes"; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. Shirley, 6 S.W.3d at 248 (citing Neil P. Cohen et al., Tennessee Law of Evidence § 404.11, at 180 (3d ed. 1995)). In this case, the trial court apparently found that the separate offenses were part of the same criminal transaction. The trial court made no explicit written findings with respect to whether evidence of one offense was relevant to some material issue at the trial of the other or whether the probative value of such evidence was outweighed by its prejudicial effect.

The "same criminal transaction" category of common plan or scheme evidence allows for the admission of evidence of other crimes when it is necessary to provide the trier of fact with a full and essential understanding of the crime on trial. Neil P. Cohen et al., Tennessee Law of Evidence § 4.04[13] (5th ed. 2005). The conditions under which such evidence is admissible, however, are narrow:

> Crimes introduced to tell the "complete story" will rarely be probative of a fact in issue in the trial of the crime charged and, therefore, rarely justify the prejudice created by their admission. For this reason, crimes admitted as part of the "same transaction" should be limited to those so inextricably connected in time, place, or manner that the jury would be unable to comprehend the essential nature of the charged crime without hearing evidence of the "other" crime.

Id. (footnote omitted).

Here, it was not necessary for the State to present evidence of the assault in order for the jury to understand the essential nature of the resisting arrest offense, *i.e.*, that the defendant used force in resisting the detective's attempts to arrest him pursuant to an arrest warrant. Nor was it necessary for the State to introduce evidence of the defendant's resistance to the arrest in order for the jury to understand the essential nature of the assault. Moreover, while the statement the defendant made to the detective about the September 26 incident during his October 2 arrest may have been relevant at his assault trial, the probative value of such evidence was outweighed by the prejudicial effect on the jury of evidence of the defendant's having resisted arrest. We, therefore, agree with the defendant that the trial court erred by denying his motion to sever the offenses.

We further agree that the failure to sever the offenses requires a reversal of the convictions. Error regarding the joinder and severance of offenses is neither structural, requiring automatic reversal, nor constitutional, requiring reversal unless harmless beyond a reasonable doubt. State v. Dotson, 254 S.W.3d 378, 388 (Tenn. 2008). Instead, the effect of a denial of the right to severance is weighed by the same standard as other non-constitutional evidentiary errors: the defendant must show that the error probably affected the judgment before reversal is appropriate. State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999). "[T]he line between harmless and prejudicial error is in direct proportion to the degree . . . by which the proof exceeds the standard required to convict." Delk v. State, 590 S.W.2d 435, 442 (Tenn. 1979).

We agree with the defendant that the inclusion of testimony in the assault trial by the police detective and the student intern served to impermissibly bolster the testimony of the victim in what would have otherwise presented the jury with, essentially, a "he said/she said" credibility determination. Under such circumstances, we must reverse the convictions and remand for separate trials on each offense. However, because of the possibility of further review, we will address the remaining issues the defendant raises in his brief.

II. Sufficiency of the Evidence

The defendant also challenges the sufficiency of the evidence in support of both convictions. In considering this issue, we apply the familiar rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

To sustain the conviction for assault, the State had to prove beyond a reasonable doubt that the defendant intentionally, knowingly, or recklessly caused bodily injury to the victim. See Tenn. Code Ann. § 39-13-101(a) (2006). To sustain the conviction for resisting arrest, the State had to prove beyond a reasonable doubt that the defendant intentionally prevented or obstructed Detective Harbaugh, whom he knew to be a law enforcement officer, from effecting the arrest by using force against Detective Harbaugh. See id. § 39-16-602(a).

The defendant contends that the evidence is insufficient to sustain his assault conviction because the State failed to prove beyond a reasonable doubt that he acted intentionally, knowingly, or recklessly in causing bodily injury to the victim. Specifically, he argues that "[t]he evidence clearly supports the [defendant's] version of the events . . . that his actions were merely a removal of [the victim] off him while the hysterical [victim] was perpetrating an attack." He contends that the evidence is insufficient to sustain his conviction for resisting arrest because "[t]he proof . . .

shows that the [defendant] merely turned away from the officer and never used any force against the officer in any way."

We respectfully disagree. The victim testified that the defendant, who was angered by her call to the police, slung her by her hair into the doorjamb and then kicked and stomped on her while she was on the floor. She was injured by the defendant's actions and had photographs of the bruises that developed. By convicting the defendant of assault, the jury obviously accredited her version of the events over the defendant's. The jury also quite obviously accredited the accounts of the arrest provided by Detective Harbaugh and Amy Bauernfeind, both of whom testified that the defendant shoved and pushed against the detective in an effort to avoid arrest, over that of the defendant, who claimed he did not use any force against the detective. Making credibility determinations of witnesses is the jury's task, and we do not disturb the jury's credibility determinations on appeal. Accordingly, we conclude that the evidence is sufficient to sustain the defendant's convictions for assault and resisting arrest.

III. Self-Defense Jury Instruction

The defendant contends that the trial court erred by not issuing his requested jury instruction on self-defense, arguing that the evidence, when viewed in the light most favorable to him, warranted the instruction. In support, he points to his testimony about the incident, including his statement that he felt threatened by the victim's actions. The State argues that the proof did not support an instruction on self-defense because "[a]lthough the defendant claimed to have acted in defense of his person at one point . . ., [he] claimed that the assault to which the [victim] testified never occurred."

At the time of trial, the self-defense statute read in pertinent part:

> A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Tenn. Code Ann. § 39-11-611(a) (2003).

A trial judge has a duty to give a complete charge of the law applicable to the particular facts of the case, including every issue of fact material to the defense if raised by the evidence. State v. Sims, 45 S.W.3d 1, 9 (Tenn. 2001). To determine whether self-defense is fairly raised by the proof and must be instructed to the jury, "a court must, in effect, consider the evidence in the light most

favorable to the defendant, including drawing all reasonable inferences flowing from that evidence." State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993).

The trial court found that a self-defense instruction was not warranted because the proof did not show that the defendant held a reasonable belief that he faced an imminent danger of death or serious bodily injury. However, although we acknowledge that the issue is close, in our view the proof warranted an instruction on self-defense. Under the defendant's version of events, he was awakened from a deep sleep in a dark room to feel himself splashed with water and to hear the victim screaming that she was calling the police. He then felt the "hysterical" and "irate" victim on top of him striking him with her hands. The defendant testified that the events transpired within seconds and that he felt threatened by the victim's actions. While he denied that he slung the victim by the hair into the doorway or kicked or hit her, he admitted that he pushed her off him hard enough that she struck her buttocks against the door. When asked whether the victim's bruises were consistent with his version of events, he replied:

> The bruise on her butt – she had a bruise on her butt where she hit the door. Like the door – the door to the bedroom when it was closed would be flush, but the door was open like this. (Demonstrating). So when I pushed her off of the bed, she falls backwards and hits that door.
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> When I turned on the light, she was on the floor. I am just, like, you know, calm down, you are losing your mind. I mean, that is what it seemed to me like that she was – had been, you know, – just something was not right with [the victim] that night.

"Serious bodily injury" is defined as "bodily injury that involves: (A) [a] substantial risk of death; (B) [p]rotracted unconsciousness; (C) [e]xtreme physical pain; (D) [p]rotracted or obvious disfigurement; or (E) [p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. § 39-11-106(a)(34) (2006). When viewed in the light most favorable to the defendant, we believe that the proof was sufficient to show that he had a reasonable belief that he faced imminent serious bodily injury, in the form of extreme physical pain, from the victim at the time he allegedly shoved her off him onto the floor.

We conclude, however, that the error in not instructing the jury on self-defense was harmless beyond a reasonable doubt under the circumstances presented in this case. See State v. Morgan Johnson, No. W2003-02349-CCA-R3-CD, 2004 WL 2237988, at *8 (Tenn. Crim. App. Oct. 1, 2004) ("When the error is of constitutional dimensions, as in this instance [in case where trial court refused to instruct the jury on self-defense], reversal is required unless the error is harmless beyond a reasonable doubt.") (citing State v. Harris, 989 S.W.2d 307, 314-15 (Tenn. 1999)). Factors for a jury to consider in determining whether there were reasonable grounds for a defendant to fear serious bodily injury from an alleged victim include any previous threats of the alleged victim, the alleged victim's character for violence, the animosity of the alleged victim for the defendant, the manner in which the parties were armed and their relative strengths and sizes. See T.P. I. – Crim. 40.06(a)

(repealed May 22, 2007) (12th ed. 2008). There was no evidence presented in this case that the victim had a character for violence, made any previous threats against the defendant, or felt animosity toward him prior to the incident. Furthermore, she was unarmed and, as a woman, presumably unequal in strength and size to the 200-pound male defendant.

IV. Consecutive Sentencing

The defendant contends, and the State concedes, that the trial court erred by imposing consecutive sentencing without any findings of whether the defendant met the statutory criteria set out in Tennessee Code Annotated section 40-35-115, or that there were any other statutorily mandated reasons to justify consecutive sentencing. The State, therefore, requests that this court remand the case for a new sentencing hearing. In so doing, the State notes that the trial court was authorized under Tennessee Code Annotated section 40-35-303 to impose a two-year probationary sentence for the defendant's assault conviction and surmises that the trial court "perhaps . . . intended to use this authority to impose an 18-month probationary sentence but instead categorized this as the result of consecutive sentences."

We agree with the defendant and the State on this issue. The trial court appeared to indicate that it was necessary to impose consecutive sentencing in order to retain jurisdiction over the defendant in the event he failed to complete his dual course. After asking the prosecutor the length of the longest domestic assault or anger management program available, the trial court stated:

> [Defense counsel], what I am included to do, sir, is to withhold any judgment with regard to any incarceration and place your client in the 52-week dual course. His jail time will depend on how he does with regard to that course.
>
> General, I think that is probably the best bet on this matter. Now I am going to run these sentences consecutively, so I will have him for two years. He's going to have a year to finish the 52-week course, and if he doesn't finish that course I still got him and I can sentence him up to 75 percent on each one under the law, as I understand it.

The trial court erred by imposing consecutive sentencing on this basis. We, conclude, therefore, that the case must be remanded for a new sentencing hearing.

CONCLUSION

Based on our review, we conclude that the evidence was sufficient to sustain the convictions but that the trial court erred in not instructing the jury on self-defense, in imposing consecutive sentencing, and in denying the motion to sever the offenses. We further conclude that the denial of

the motion to sever constitutes reversible error. Accordingly, we reverse the convictions and remand for the defendant to be tried separately on each offense.

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ALAN E. GLENN, JUDGE